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AUTHOR	Hyland, Timothy F.
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ABSTRACT

While the status of the application of constitutional rights in public schools has become clearer because of court cases and statutes, the position of the private and parochial schools has remained vague. This paper examines the status of the private and parochial schools not only to determine how due-process requirements have been extended to schools, but also to show which schools fall under the constitutional requirement. The legal principles and precedents affecting this distinction should also help public school principals to understand the legal basis for their consitutional responsibilities. So far, few cases have been successfully brought against nonpublic schools or their administrators on the basis of depriving students or teachers of due process or other constitutional rights. In making their decisions, courts have examined educational institutions for signs of governmental control or involvement. Most courts have not been convinced that contacts typically found, such as teacher certification, tax exemption, or financial aid to students in special programs, are sufficient to involve the application of the Fourteenth Amendment. (Author)

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A Legal Memorandum

NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS
1904 Association Drive
Reston, Va. 22091

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NON-PUBLIC SCHOOLS AND THE FOURTEENTH AMENDMENT

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Due process has become a familiar phrase to school administrators. Its familiarity is the result of increasing litigation involving students and minors and their claims to protection under the Fourteenth Amendment to the U.S. Constitution. Because of the constitutional nature of this issue, a number of states have enacted statutes to outline the requirement for due process within the public schools of the states.

While the status of the application of constitutional rights in public schools has become clearer because of court cases and statutes, the position of the private and parochial schools has remained vague. This Legal Memorandum examines the status of the private and parochial schools to determine not only how due process requirements have come to be extended to schools, but also to show which schools fall under the constitutional requirement. The legal principles and precedents affecting this distinction should also help public school principals to understand the legal basis for their constitutional responsibilities.

Historical Background

The requirement for due process was originally established by the Fifth Amendment to the U.S. Constitution in 1791 with the famous injunction that "No person shall be...deprived of life, liberty or property without due process of law." However, because of the federal nature of the Union, such requirements were effectively placed only on the national government. It was not until 1868 and the passage of the Fourteenth Amendment that the requirement of due process was placed upon the states with the phrase, "nor shall any State deprive any person of life, liberty, or property without due process of law."

During the period 1870-74, four acts, referred to collectively as the Force Acts, were passed by Congress. These acts were sectional in nature and were intended to compel recognition of the Civil Rights Act of 1866 and the Fourteenth Amendment. Part of this legislation gave black people social equality in privately owned gathering places.

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In 1883 a series of five cases, since referred to as the Civil Rights Cases, challenged this legislation.[1] As a result of these cases, the U.S. Supreme Court invalidated the legislation on the grounds that the Fourteenth Amendment was addressed only to deprivation of rights by the states and did not encompass private acts of discrimination.

The decision had two far-reaching effects: first, it marked the end of federal attempts to protect the freedmen from southern discrimination; and second, the decision also served to define the scope of the Fourteenth Amendment. Mr. Justice Bradley's majority opinion stated: "Individual invasion of individual rights is not the subject matter of the amendment," but rather, "it is state action of a particular character that is prohibited."[2]

Equal Protection of the Law

Since 1950 several Supreme Court opinions have served to clarify further the concept of "state action" in regard to the equal protection clause of the Fourteenth Amendment. In *Burton v. Wilmington Parking Authority*, which dealt with the application of due process to a snack bar that had leased its space from a governmental agency of the state of Delaware, the majority opinion of Mr. Justice Clark stated that the Fourteenth Amendment must be complied with. However, he pointed out that there was no attempt to set up a hard and fast rule but that "state action" would be determined by "sifting and weighing circumstances."[3]

Evans v. Newton dealt with the status of a park for the use of whites only in Macon, Ga. Originally under private ownership, the park had been donated to the city and operated under the racial restrictions in the will. Despite subsequent resignation of the city as trustee, Mr. Justice Douglas stated, "The public character of the park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment." He warned that "conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Despite this warning, Douglas noted that, "The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions."[4]

In the school context, *Cooper v. Aaron* concerned the attempt of the state of Arkansas to establish "private" segregated schools with state funding. In declaring the state's scheme a violation of the equal protection clause, the justices admitted that they had no rule for state action, but they looked for "state participation through any arrangement, management, funds or property" in order to determine the degree of state action.[5]

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1 Civil Rights Cases, 109 U.S. 3, 27 L.Ed. 835 (1883)
2 Civil Rights Cases, 27 L.Ed. 839
3 *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed. 2d 45 (1961)
4 *Evans v. Newton*, 382 U.S. 296, 15 L.Ed. 2d 373 (1966)
5 *Cooper v. Aaron*, 294 F. 2d 150; cert. den. 358 U.S. 1, 3 L.Ed. 2d 1 (1958)

The Concept of Due Process

The case of *Dixon v. Alabama State Board of Education* extended the concept of procedural due process to college students in tax-supported colleges when expulsion was threatened. The court said: "Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law."[6] As in the case of the equal protection clause, the court recognized the necessity of finding state action, and found such action to exist in the operation of a university by the state board. However, the recipients of due process in this case were still adults or near-adults.

The extension of due process guarantees to juveniles turned upon the decisions in two very significant Supreme Court cases: *Kent v. United States*[7] and *Application of Gault*.[8] In the *Kent* case, which dealt with juvenile courts and due process, the Court stated: "The admonition to function in a parental relationship is not an invitation to procedural arbitrariness." Further, it stated: "There is no place in our system of law for reaching a result of such tremendous consequences without hearing, without effective assistance of counsel, without a statement of reasons."

One year later in the *Gault* case, again on the subject of juvenile courts, Mr. Justice Fortas said: "Juvenile court history has again demonstrated that unbridled discretion however benevolently motivated is frequently a poor substitute for principle and procedure." In one of the most often quoted passages from the *Gault* decision, Justice Fortas asserted that "Under our Constitution, the condition of being a boy does not justify a kangaroo court."

To this point the Fifth Amendment's injunction to accord due process had been systematically extended to the states by the Fourteenth Amendment, extended beyond strictly judicial proceedings in *Dixon* and extended to juveniles in the *Kent* and *Gault* cases. However, in each of these cases the courts found significant state action because of the direct involvement of the state governmental entities.

Three federal court cases in the late Sixties, concerning the extension of due process for college students in private colleges, rediscovered the lessons of the Civil Rights Cases. In each case the court re-emphasized that the Fourteenth Amendment required significant state action before its jurisdiction was clear. Each judge felt that there had been no significant state action involving these private colleges. As a result of these cases, the due process guarantees extended to students in the tax-supported colleges because of *Dixon* would not be extended to the private colleges.[9]

In 1970, the case of *Bright v. Isenbarger*[10] examined the issue of the application of the Fourteenth Amendment requirement of due process to non-public secondary

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6 *Dixon v. Alabama State Board of Education*, 368 U.S. 930, 7 L.Ed. 2d 193 (1961)
7 *Kent v. United States*, 383 U.S. 541, 16 L.Ed. 2d 84 (1966)
8 *Application of Gault*, 387 U.S. 1, 18 L.Ed. 2d 527 (1967)
9 *Powe v. Miles*, 407 F. 2d 73 (1968). *Browns v. Mitchell*, 409 F. 2d (1969). *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535 (1968)
10 *Bright v. Isenbarger*, 314 F. Supp. 1382 (1970) aff'd 445 F. 2d 412 (1971)

schools. In this case the plaintiffs, who were expelled from Central Catholic High School, contended that the manner in which they were expelled violated their Fourteenth Amendment rights to due process. In this decision the District Judge noted that "Insofar as *Dixon*-type procedures would require a change in Central Catholic High School's disciplinary practices, the liberty of parents who choose to send their children to Central Catholic High School...would be restricted."

The judge went on to deny the protection of the Fourteenth Amendment to students who attend private, parochial schools. He noted the unanimity in the decisions in *Powe*, *Browns*, and *Grossner* concerning the need for significant state action before the Fourteenth Amendment accorded due process to college students. The judge stated that "Because the state of Indiana was in no way involved in the challenged actions, defendants' expulsion of plaintiffs was not state action. Public education is a state function." (Emphasis in the original.) "To conclude otherwise would have the effect of eliminating private education." This case was appealed by plaintiffs to the Circuit Court of Appeals, which affirmed the lower court decision in 1971.

There is some indication in the lower court opinion that a different standard might have been applied had alleged action of the school involved racial discrimination.[11] A similar view may have affected the decision in *Evans v. Newton*, in which the park was found to be sufficiently involved with the state as to constitute state action. There, too, the action objected to was racially discriminatory.

In two other cases involving racial discrimination, federal courts have disallowed tax exemptions. In one it was made clear that the standard applied in cases involving denial of equal protection of the law (as in the case of racial discrimination) differs from that involving other constitutional rights.[12]

Current Status of Due Process

The usual test for application of due process requirements in a non-public school has been whether sufficient signs of state action were present to indicate either that the school or the specific activity involved in the case was strongly affected by state action. In *Doe v. Heckler*,[13] for example, hair and grooming codes of a private school were held to be covered by constitutional protections because the school accepted state funds as tuition payments.

In *Rowe v. Chandler*,[14] a case involving the suspension of a graduate student of education from his student teaching assignment, the staff of a private college was held not to be "acting under the color of law" as required by the Federal

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11 *Bright v. Isenbarger*, supra, pp. 1393-1394

12 *Pitts v. Dept. of Revenue of Wis.*, 333 F. Supp. 662 (1971); see also *Green v. Connally*, 330 F. Supp. 1150 (1971) affd. sub-nom *Coit v. Green*, 404 U.S. 997 (1971)

13 316 F. Supp. 1144 (N.H. 1970)

14 332 F. Supp. 336 (Kan. 1971)

Civil Rights Act. Neither state accreditation of the college nor certification of its teaching graduates by the State Board of Public Instruction was regarded as sufficient involvement.

Finally, in *Furumoto v. Lyman*[15] the Federal District Court of California went into considerable detail to spell out what it would consider as necessary to form a basis for applying constitutional protections in a non-public school. The case grew out of an attempt by students to force William Shockley, a professor of engineering better known for his views on genetics, to debate with students who believed his views to be false and insulting to members of non-white racial groups. A group of students confronted the professor in the midst of an engineering class and prevented an examination then in process from being completed. The students, subsequently dismissed after a hearing, sued the university's president along with others under the Civil Rights Act of 1871. (Title 42, 1983 U.S.C.) Specifically, the students claimed deprivation of their First Amendment right of free speech.

Aside from whether a person's right to free speech would permit him to disrupt a class in the way occurring in this case, the court focused its attention on the question of whether the president and other officials of Stanford University were acting "under color of law" as required by the statute. This would only be so if the university were either governmental in nature or if the state were directly involved in the action in question. In examining these two possibilities, the court dismissed a variety of benefits and privileges conferred upon the university by the state as insufficient to confer governmental status. These included the approval of criteria for degrees and the receipt of financial aid. In dismissing cases such as *Evans v. Newton*, the court said the test must be whether, and to what degree, the state or some public entity or official controls the institution. In this case, no control was found.

The court then turned to the question of governmental involvement in the specific act alleged to be violating the plaintiff's rights. To evidence such involvement, the court said that the state would either have to expressly undertake to regulate student conduct, or to act in a way that demonstrated that they had actually regulated such conduct. At the very least there would have to be evidence that school officials thought that the state had such power and acted in that belief. Finding no evidence of any of these circumstances, the court dismissed the case.

In a very recent case brought against a Catholic high school in New York state by a suspended student,[16] the court dismissed the complaint on the basis of insufficient state contacts. But in distinguishing the case from one in which a university was found liable to a student on due process grounds, the court added that the situations were not identical. "A high school student has immediate access to the public schools to complete his education. A college student may not be able to transfer so easily."

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15 362 F. Supp. 1267 (Cal. 1973)

16 *Oefelein v. Monsgr. Farrell H.S.*, Supreme Court, Richmond County, N.Y. Index No. SP 37/74 (1974)

Conclusions

A citizen's right to due process, like most of his other traditional rights and freedoms, is accorded him by the Constitution of the United States, and sometimes by the constitutions of the states. Through judicial interpretation, the strictures placed upon the national government against interference with the rights of its citizens were gradually applied against state governments as well and, of course, against all of their subsidiary organs.

The Civil Rights Act of 1971 makes interference with constitutional rights actionable against any person acting "under color of law" as well, and this provision has been widely used against officials of public schools as well as other units of government.

But so far, few cases have been successfully brought against non-public schools or their administrators on the basis of depriving students or teachers of due process or other constitutional rights. In making their decisions, courts have examined educational institutions for signs of governmental control or involvement. Most have not been convinced that contacts typically found, such as teacher certification, tax exemption, or financial aid to students in special programs are sufficient to invoke the application of the Fourteenth Amendment to the Constitution.

There is also some indication that a legitimate distinction may still exist between the rights of children and adults, and between students in private high schools and those in college, because of the availability of the free public school system as an alternative means of securing a high school education.

There is, however, some basis to believe that the courts will go further in extending constitutional protection to persons demonstrating unfair and discriminatory treatment on the basis of race or color.

Certainly, most school administrators, whether in private or public institutions would do well to extend the basic elements of due process to all students in the interest of fundamental fairness, but it is hoped that this Memorandum will clarify the limits of their legal responsibilities.

This Legal Memorandum is based in large part upon an article contributed by Timothy F. Hyland, a graduate student in education at Purdue University.

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